Penn State International Law Review

Volume 8
Number 1 *Dickinson Journal of International Law*

Article 4

1989

The Hamiltonian Paradigm and the International Securities Market: Reversing American Industry's Relative Decline in the Twenty-First Century

Bernard M. Rethore

The Hamiltonian Paradigm and the International Securities Market: Reversing American Industry's Relative Decline in the Twenty-First Century

Bernard M. Rethore*

> How small, of all that human heart's endure, that part which laws or kings can cause or cure!
>
> — Samuel Johnson

I. Introduction

Over the last decade, transnational financial services[1] and business practices[2] have undergone a metamorphosis. Traditional structures and impediments to conducting international ventures have begun to fall away. The impending opening of borders among European Economic Community (EEC)[3] nations, the revising of the General Agreement on Tariffs and Trade (GATT),[4] and, most recently, elimination of trade barriers between the United States and

---

* General Counsel, McDyre & Spendley, Ltd., Darien, CT; B.A. LeMoyne College 1985; J.D. The Dickinson School of Law 1988.

1. One author states that:

> Recent developments in international trade, production and finance point toward the potential development of an international market as a means of mobilizing world capital resources more effectively. The greater need for foreign capital, especially to finance the growth of multinational (as well as national) opportunities; the continued expansion of international capital markets; the increased interest, affluence, and mobility of individual investors; and the present inadequacy of many national primary and secondary markets are all factors that would seem to favor the rise of an international securities market.

H. BLOOMENTHAL, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION 2-3 (1982) [hereinafter H. BLOOMENTHAL].

2. The Japanese initiated the revolution with their unique approach to employer/employee relations in manufacturing. Their success spurred response by American industry.

3. EEC member country borders are scheduled to be opened in 1992, allowing free movement of trade, labor, and capital. For an overview, *see* The Economist, which ran a five part series on the future of Europe, 1992, beginning November 19, 1988, and concluding December 17, 1988.

4. "The General Agreement on Tariff's and Trade, *opened for signature* October 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 50 U.N.T.S. 194 (entered into force Jan. 1, 1984). The acronym GATT refers to the international body supervising the agreement as well as the agreement itself." Note, *The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go From Here?*, 5 DICK. J. INT'L L. 82 (1986).

Canada,[5] have all contributed to this development. In turn, continuing major structural changes in the world's financial markets have further accelerated growth.[6] Learning from hindsight,[7] money managers deftly juggle risk, innovation, and technology in the burgeoning world market. In short, international trade is expanding, and surplus institutional capital is flowing freely worldwide.[8]

American industry, however, has been slow to capitalize on the international market.[9] Although there has been a clamor for increased competitiveness,[10] few companies have actually achieved the new 'world class' status.[11] Most sectors of industry are still forced to

---

5. Note, *The Canada-U.S. Free Trade Agreement: Its Aspects, Highlights, and Probable Impact on Future Bilateral Trade and Trading Agreements*, 7 DICK. J. INT'L L. 371 (1989).

6. Sir Kit McMahon, Chairman and Chief Executive, Midland Bank, explains that:

> These fall into three broad categories: the globalization of markets, requiring the servicing of major corporate and institutional customers to be managed on an international basis; the securitisation of debt at the expense of traditional banking products; and deregulation in the major financial centres of traditional practices which had served to limit activity and financial innovation. The net result has been a massive increase in international capital flows and the diversification of the banking industry into the securities market.

McMahon, *Foreword*, 1 GLOBAL INVEST. MGMT 3 (Summer 1988) [hereinafter McMahon].

7. Innovation and development carries its share of risk. The collapse of the equity markets in October, 1987, is a poignant example of this. The market dramatically lost 508 points on volume of 656,103,730 shares. Pauly, *A New Invisible Hand*, NEWSWEEK Nov. 2, 1987, at 21. Many people in the securities industry complained that the program traders had been responsible for the market twitching in such a volatile manner, resulting in the destruction of billions of dollars of wealth. Mintz, *Who? What? Where? When? How? Questions About the Crash No One Asked But Should Have*, BARRONS Nov. 2, 1987, at 26. In short, the October collapse of stock prices caused New York financial pundits and Washington policymakers to scramble in search of a single, simple solution. Despite the setback, globalization, securitization, and deregulation advances have transformed traditional domestic understandings of the international movement and management of funds.

8. McMahon, *supra* note 6, at 3. Some argue that this occurs naturally given the efficient capital market theory. This premise states that the market is efficient when prices reflect all available information. Note, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STANFORD L. REV. 1031 (1977). In short, prices reflect *informational* efficiency to facilitate *allocational* efficiency of capital resources to the most profitable investment. *Id.* at 1037.

9. This sluggish approach is primarily due to the manner by which industry is burdened by government. *See infra* section entitled *The Past Fifty Years — Excessive Government Intervention.* Alternatively, *see* Kotkin & Kishimoto, THE THIRD CENTURY: AMERICA'S RESURGENCY IN THE ASIAN ERA (1989), which argues that America's constant immigration infusion and open society may succeed over the insular and xenophobic culture of Japan.

10. One commentator, describing America's inability to be competitive, writes that:

> [t]he recent dramatic drops in stock markets worldwide have raised doubts about America's economic future. A central question arising from this lack of confidence: Is the United States facing a crisis in its ability to compete in the world? Many Americans would say yes. They view the United States merchandise trade deficit, which reached $170 billion in 1986 and $78 billion in the first half of 1987, as good reason for concern about America's economic future. Some mistakenly see the trade deficit as a problem in itself and advocate protectionist policies as the remedy. Others see it as the symptom of deeper problems, of the inability of American businesses to compete against foreign counterparts.

MAKING AMERICA MORE COMPETITIVE 1 (E. Hudgins, ed. 1987) [hereinafter Hudgins].

11. The concept of "world class" manufacturing was articulated by Richard Schoenberger. He explains that:

> world class manufacturing depends on blended management — rather than

compete despite the heavy hand of government via law and regulation.[12] But, the tradition of Hamiltonian thought on the relationship of republican government to commercial activity can provide a primer on how to capitalize on the economic renaissance encouraged by the financial markets—moving from the twentieth century paradigm of interventionist politics (and economics)[13] back toward the eighteenth century model of purposeful[14] government involvement that encourages the prosperity of commerce—that is, regulatory reductions both in finance and industry.[15]

This article discusses the eighteenth century understanding of the subtle equilibrium between polity, economy, and government (as manifest in legislation and regulation);[16] the deliterious effect of the laissez-faire heterodoxy that entrenched itself during the nineteenth century; and, the adverse reaction that occurred in the twentieth century. In turn, this article shifts its inquiry toward the internationalization of world financial markets as a guide for how United States industry can reclaim its patrimony: by encouraging a re-adoption of

---

> domination by a separate group of managers — which marshals resources for continual rapid movement. To achieve world class status, companies must change procedures and concepts, which in turn leads to recasting relations among suppliers, purchasers, producers, and customers. Employee involvement and interaction, both on the shop floor and in the decision-making/problem solving process, is key. (And,) making maximum use of people and current machinery is a company's first priority; (upgrading automation), if necessary, should come much later.

R. SCHOENBERGER, WORLD CLASS MANUFACTURING i (1986).

12. For instance, the United States Government continues to complicate the field of employee compensation, pension and benefits with additional regulations. Consider the record keeping requirements on small businesses demanded by section 89 as evidence of this strain, and the current swell of public opinion to have it repealed.

13. Economics has been substituted as an end in and of itself, with social values bowing to the new deity of commercial impulses, rather than the more logical approach of economic arrangements "facilitating and encouraging more rudimentary communal ends." Zoll, *The Conservative Metamorphosis*, INTERCOLLEGIATE REV. 3, 7 (Spring 1988) [hereinafter Zoll]. More simply, social values, whatever the community deems them to be, should be the catalyst behind economic enterprises. Recently, however, social objectives have been cast in light of their "efficacy by their compatibility with economic theory." *Id.* "At times, theories about how to economically facilitate social ends become invested with a spurious autonomous legitimacy or authority that eventually reverses the process and the economic paradigm, ostensibly utilitarian, becomes the formative conceptions of the social order." *Id.* Those goals that pass muster rise to the forefront and "replace those essentially axiological in nature. In short, a theological and ethical orthodoxy is retired in favor of an economic one." *Id.*

14. The author chooses this term of art to illustrate the concept that change must be purposeful rather than occurring simply for the sake of change itself. Indeed, there is virtue in inaction, and conservation; appreciation must occur well before alteration.

15. More abstractly, this entails a realignment of enterprise association with civil association. In other words, the diverse objectives of the community no longer have an adequate framework that expressly delineates the extent to which members may conduct their individual pursuits of liberty. Sobran, *Pensees: Notes for the Reactionary of Tomorrow*, Nat'l. Rev. 23, 30 (Dec. 31, 1985) [hereinafter Sobran].

16. The connection between polity and economy was originally postulated by Miller, *The Constitution and the Spirit of Commerce*, HOW CAPITALISTIC IS THE CONSTITUTION (R. Goldwin & W. Schambra eds. 1982) [hereinafter Miller]. Miller's thesis is provocative and provides the foundation for the 18th century formula presented *infra*.

the eighteenth century model of the proper balance between government and commerce. Finally, using the example provided by the move toward an international financial market, this article concludes that if this reclamation occurs, it may allow industry in the United States to participate beneficially in the burgeoning international market of the twenty-first century.

II. Understanding the Evolution of the Competing Paradigms

A. *Introduction—Origin of the Formula*

To understand the concept of the interrelationship between society and economy, an outline of the historical underpinnings of the socioeconomic formula is necessary. The Federalists[17] cast at the anvil a cohesive civil and enterprise association[18] in the form of republican government, which held liberty as the ideal.[19] James Madison recognized that throughout history democracies "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their death."[20] In short, they "bred the related diseases of majority factions and violent factions, both of which could bring about the destruction of liberty."[21] The Federalists boldly set out to reconcile this problem. One commentator, Stephen Miller, writes that according to Hamilton:

> [T]he science of politics offered a remedy that would reduce the possibility of majority faction and violent faction without subverting liberty. The remedy, of course, was a political one—the creation of a strong national government—but it was also an economic one; this republic would become strong and stable only if it were a predominately commercial polity. For the central conclusion of those who advocated a science of politics was that only in predominately commercial polities could liberty

17. For an extensive overview, *see generally* SAVING THE REVOLUTION (C. Kesler, ed. 1987).

18. *See supra* note 15.

19. Supported and maintained by the rule of law, "a great common enterprise" was constructed to facilitate "that primacy of private life" — i.e. individual liberty. Sobran, *supra* note 15, at 30.

20. Miller, *supra* note 16, at 150 (quoting THE FEDERALIST, No. 10, at 81 (J. Madison) (1982 ed.)).

21. *Id.* Madison defined factions on November 22, 1787, in a letter to the people of New York. He wrote:

> By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

THE FEDERALIST, No. 10, at 43 (J. Madison) (1982 ed.).

flourish without leading to violent civil discord.[22]

"The ideal of majoritarian government (then) was to provide a rule of law approximating, as closely as possible, unanimous consent."[23] Thus, it was with this understanding that a formula of government, which balanced polity[24] and economy, was forged and the Constitution framed as a means of preserving democracy.

B. *The Eighteenth Century Paradigm*

The formula is founded upon the principle that the expansion of commerce would result in political stability, reducing the natural propensity of democratic government to commit suicide through internal discord caused by violent factions.[25] The interdependence between the stability of government and its separate, outside commercial pursuits, although seemingly incongruent, enables democracy and liberty to flourish while holding in abeyance those vexatious elements of society.[26] Commercial expansion, therefore, maintains a stable society. Conversely, a secure polity encourages increased commercial development. The tie that binds the two together is the national government. It can either encourage or discourage the prosperity of commerce[27] by the type and extent of the restrictions it

22. Miller, *supra* note 16, at 151.

23. Sobran, *supra* note 15, at 30. "The Framers were concerned not to let the 51 per cent push the 49 per cent around. They provided filtering devices in the hope that factional interests would cancel each other out, even in the event that 'republican virtue' — civic mindedness — failed to check them." *Id.* "Consensus is not always possible, but it is something to aim for, and some scholars argue that even Rousseau's 'general will' envisioned the state not as a vehicle of popular passion but, on the contrary, as an institution that would be restricted by consensus." *Id.*

24. Polity is an amorphous concept. It includes, *inter alia*, a society's collective, cumulative conscience, and embraces its nascent mores.

25. One commentator explains that:

> Property and diversity were essential parts of the Federalist solution to the problem of popular government. Republics throughout history, the Federalist knew, had been torn asunder by the bitter struggle of political factions formed around opposing ideologies or around extreme inequalities of wealth. The American republic would escape that fate; a citizenry interested, above all, in the acquisition of property or wealth would have little time for ideological disputation or patience with it. And a modern commercial nation, organized for the acquisition of property and thus characterized by the division of labor, would be fragmented into such a diversity or "multiplicity of interests" that the great, fatal struggle of rich and poor would be averted. But commerce requires large markets, and large markets require "a great extent of territory"—sufficiently great that an energetic national government is necessary for its administration. The problem of fatal republican division, The Federalist argued, would not arise in the large commercial republic, administered by an energetic national government.

Schambra, *The Roots of the American Public Philosophy*, AMERICAN FEDERALISM: A NEW PARTNERSHIP FOR THE REPUBLIC 19, 21 (R. Hawkins, Jr. ed. 1983) [hereinafter *Roots of Public Philosophy*].

26. Miller, *supra* note 16, at 150.

27. Hamilton explains in THE FEDERALIST No. 12 that "the prosperity of commerce is now perceived and acknowledged by all enlightened statesman to be the most useful as well as

issues. Therefore, the formula may be stated as democracy equals a healthy polity plus a progressive economy less government restrictions (intervention).[28]

C. Application of the Eighteenth Century Model

Republican government is predicated on the ideal that citizens should be free to pursue their own passions.[29] Government is charged with the responsibility of maintaining an environment that reconciles the broader communal objectives with individual definitions. Simply, this entails acting as a steward; that is, providing the opportunity for the pursuit of private liberty.

In the eighteenth century, government stewardship generally took its lead from the free market; but there were times when those principles were deemed inappropriate or irreconcilable with the community-defined ideal.[30] Indeed, government intervention in commerce was desirable when it could bestow a benefit on the polity as a whole by mitigating the detrimental effects of commercial expansion.[31]

---

the most productive source of national wealth and has accordingly become a primary object of their political cares." THE FEDERALIST, No. 12, at 160 (A. Hamilton) (1982 ed.).

28. The equation is stated as such: Democracy = Polity+ Economy - Restrictions. The polity component is basically constant with only slight variations in national sentiment that naturally occur over time. It includes both the decentralized values of a particular locality and the centralized interests of the nation. Likewise, the economy component is also fairly constant. Economy, although it is defined by basic communal goals, is not subject to the ephemeral upward or downward fluctuations experienced by the nation throughout the year. Instead, it represents the broader philosophical pursuit of wealth, generally called capitalism in the United States, and more particularly, a progressive economy focused on producers and consumers. Finally, the last component is the single element subject to extreme variations. Simply stated, the greater the restrictions, the less room is available for economic expansion. This decreases the stability of the polity as people shift the focus of their attention from the pursuit of wealth toward the actions of government; from these roots, factions ferment and grow. On the contrary, when restrictions are relatively small, the economy is able to forge ahead as quickly as the producers and consumers can carry it, thus strengthening the stability of society by reducing the tendency of the populace to organize into factions, since they are again concentrated on their individual pursuits of liberty.

29. McDonald, *The Constitution and Hamiltonian Capitalism*, HOW CAPITALISTIC IS THE CONSTITUTION, *supra* note 16, at 72 [hereinafter McDonald]. This idea is premised on the understanding that "private vices" (self interest) derive "publick benefits" (the development and operation of society) as ordered social structures, such as law and language, naturally result from individual pursuits. Mandeville, THE FABLE OF THE BEES (reprinted 1989) [hereinafter Mandeville].

30. Miller, *supra* note 16, at 161.

31. In essence, purposeful legislation checked polity and economy. It is important to appreciate the persuasive effect of government intervention.

The 19th century pure laissez-faire approach to government upset the intricate balance, as will be discussed *infra*. It allowed the economy to proceed headlong without either communally defined objectives or legislatively prescribed parameters.

Today, the impact of a developed democratic government on society is even more pronounced, as discussed *infra*. Simply, government affects economy whether it issues regulations or not. The manner by which it spends yields a certain degree of symmetry. One commentator explains that:

> Merely by having fiscal and monetary policies and a budget, government has a profound effect on economic life. To choose certain policies rather than

To accomplish this endeavor, Madison argued, that government had to be a disinterested, strong national legislature.[32] He reasoned that "it becomes every Government to lean rather to a confidence in the judgment of individuals, than to interpositions controlling the free exercise of it."[33] But Madison also recognized that excessive or exiguous regulation would impede the prosperity of commerce. This was a narrow tight-rope to walk, yet one he believed a vigilant legislature could adequately navigate.[34] The government's objective was to maintain symmetry between too much and too little. And, under the equation, the restrictive variable operates on the theory that undesirable individual economic pursuits could be tempered by a government of purposeful laws.[35]

> others, and to spend $750 billion in certain ways rather than other ways, is to choose to shape the economy in specific ways. The one choice no government has, least of all a welfare estate in a developed democracy, is nonintervention. Indeed, the word "intervention" suggests zanily, that the state exists somehow outside the economy, rather than being woven into its fabric. The public sector is, after all, a sector of the economy.

G. WILL, THE NEW SEASON 67 (1987).

32. James Madison's idea of the role of the Senate was as a "trustee" of the governed. Under such stewardship, national interests should be protected from unpurposeful change. By its very nature, "the Senate's national perspective enables it to elevate the character of domestic legislation. Senators have substantial latitude to attend to the general good, rather than act merely as ambassadors of provincial interests." Landi, *Madison's Political Thought*, 6 POL. SCI. REVIEWER 72, 92, 103 (1976). Theoretically, legislators are in the best position to ascertain when public interest necessitates restrictions on commerce to provide for "the safety and prosperity of the nation." Miller, *supra* note 16, at 161 (quoting THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 485 (Meyers, ed. 1973)).

33. Miller, *supra* note 16 at 161.

34. Justice Antonin Scalia posited that the ratification of the Eighteenth Amendment (direct election of senators by the electorate rather than appointment by a state legislature) seriously jeopardizes the effectiveness of a state check on the federal government. Remarks before the Federalist Society meeting at Villanova University School of Law, Fall 1988.

W.B. Allen explains that there were two explicit reasons "to include the states in their political capacity in the formation of the government." Allen, *Justice and the General Good: Federalist 51*, SAVING THE REVOLUTION 138 (C. Kesler, ed.) (1987). He writes that:

> [s]o far as this may expose the Union 'to the possibility of injury from the State legislatures, it is an evil; but it is an evil which could not have been avoided . . . . If this had been done it would doubtless have been interpreted into an entire dereliction of the federal principle, and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision." [*Federalist* 59, at 364 (1961 ed.)].
>
> As for the second (reason), one need only consult the histories of Rome, Sparta, and Carthage to discover the value of some body that will provide stability in a government all too prone to momentary passions. "The cool and deliberate sense" of the people must ever serve as a command for their representatives and agents; but the latter (Senate) must always reflect just such sense rather than the spontaneous rages of the people. To this real advantage it is necessary to add "auxiliary precautions," in the form of balances and checks and the separation of powers [*Federalist* 63].

Id.

35. McDonald, *supra* note 29, at 72. McDonald elucidates that:

> The Constitution and the Hamiltonian system of political economy embodied these two principles in America's fundamental law. Now, the idea of fundamental law can be understood most readily if one conceives of political and economic activity as games played in accordance with rules: Fundamental law is the rule book, defining the objects of the game and specifying how it is to be played.

The economic element of the equation is also noteworthy. It is premised on the understanding that the pursuit of individual wealth is predicated on the ability to satisfy others.[36] "As Adam Smith put it, 'It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard of their own interests.' "[37] Society is best served if all of its members are free[38] to pursue their individual dreams without unnecessary intervention. As the Mandeville Essays describe in THE FABLE OF THE BEES, social structures are a spontaneous growth developing out of individual human actions.[39] Thus, the paramount goal of a stable democracy is realized when there is a balance between social ends, commercial pursuits and government restrictions.

D. Laying the Groundwork for the Fall from Paradise—the Nineteenth Century Paradigm

During the nineteenth century, the Hamiltonian model was abandoned in favor of a new paradigm.[40] Advocates argued that the government should not interfere in the pursuit of individual wealth. And, industry should not be allowed to ask government for favors.[41] Yet, what these "reformers" were really encouraging were entrepreneurial activities that inhibited competition and economic growth via monopoly.[42] Over time, the prosperity facilitated by eighteenth century commercial practices stagnated. The laissez-faire government's refusal to act purposefully (as it had in the previous century) led to the elimination of purposeful government action as a

---

> The Constitution was the rule book for government, the Hamiltonian system for the economy.

Id.

36. *Id.* at 72.

37. *Id.* at 72 (quoting A. SMITH, THE WEALTH OF NATIONS 15 (1961 ed.)).

38. Joseph Sobran explains that liberty in the ancient world was predicated on "special status; hardly anyone imagined it as potentially universal, let alone as a 'natural right.' " Sobran, *supra* note 15, at 28. By contrast, modern Western society somehow feels morally compelled to extend civic membership to "every competent individual." *Id.* But, as Henry Jaffe notes, "the Founding Fathers used the words 'free' and 'equal' as synonyms." *Id.* Sobran writes that:

> they didn't think there was any "tension" between the two things, but, on the contrary, thought that the two things were really one. Men were free in being equal and equal in being free, as Locke had put it, from being subject to the arbitrary will of anyone else, monarch or slaveowner.

Id.

39. Mandeville, *supra* note 29.

40. Miller, *supra* note 16, at 161.

41. *Id.* at 162.

42. *Id.* For example, this is easily visible by the manner in which John D. Rockefeller built the Standard Oil Company in the late 1870-80's or the method by which Andrew Carnegie developed the steel industry. Monopolies, however, are inefficient. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (3rd ed.) (1987) and J. BOBER, INTERMEDIATE PRICE AND INCOME THEORY, chapters 8 & 9 (1955). Moreover, the deterioration that occurred during the 19th century resulted in private sector inefficiency.

principal stabilizing force.[43]

Samuel Eliot Morison[44] characterized the early nineteenth century as "America's busy age."[45] By mid-century, industrialization was occurring at a rapid pace.[46] By century's end, it became the age of trusts and monopolies, and "cutthroat competition in which the big fish swallowed the little fish and then tried to eat one another."[47] As Morison observes, "these expectations and abuses were long tolerated by Americans, so imbued were they with laissez-faire doctrine, so proud of progress, improvement, and development, and so averse to increasing the power of government."[48] Unfortunately, the lesson of purposeful government intervention[49] to balance unfettered individual economic pursuits with broader communal objectives was lost on succeeding generations.[50] In short, civil association surren-

43. Martin Lipton discusses the generational corporate governance debate, by addressing what he characterizes as the "third stage of corporatism, the age of finance corporatism." This era is dominated by the institutional investor and professional investment manager. Although his definition of early corporatism is not as broad as the Hamiltonian paradigm discussed *supra*, Lipton's articulation of the first stage of corporatism in the nineteenth century is illuminating, especially in terms of the transformation that the economy endures during the period.

He writes that:

> Corporate governance (initially) posed few internal or external concerns for society. Most businesses were essentially local. Corporate managers were elected by, and responsible to, a concerned and cohesive body of stockholders. Despite the rise of general incorporation, most states retained strict limits on the size and scope of corporate activity.
>
> During the final quarter of the nineteenth century, states began to remove restrictions on corporate size, and it became permissible to incorporate "for any lawful purpose." Corporations grew in power and complexity. Local opinion and the invisible hand of the marketplace were no longer sufficient to ensure social well-being. On the state level, public utility commissions were created to regulate the rates and services of natural monopolies. Congress passed the Interstate Commerce Act to regulate the railroads, and the Sherman and Clayton Acts to preserve the benefits of competition.

Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 5 (1987) [hereinafter Lipton]. *See* Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 664 (1974); H. FAULKNER, THE DECLINE OF LAISSEZ-FAIRE (1951), and I. COCHRAN, AGE OF ENTERPRISE (1949). Growth occurred, but often at the expense of the rest of the polity.

44. Morison, twice a Pulitzer Prize winner, was an historian and biographer. S. Morison, OXFORD HISTORY OF THE AMERICAN REPUBLIC (1965) [hereinafter Morison].

45. *Id.* at 470.

46. *Id.* at 468-84.

47. *Id.* at 762. One commentator cynically noted that:

> At this period Americans found they could, by the experience of a daring and cunning of a peculiar, reckless and low order, so take advantage of the laws of the land and its economic customs as to create for themselves wealth, or the equivalent, money, to practically an unlimited extent, without the aid of time or labor or the possession of any unusual ability coming through birth or education.

Id. at 763, (*quoting* T. LAWSON, FRENZIED FINANCE (1905)).

48. *Id.* at 764.

49. Morison notes that there was an inherent confusion as to whether the States or the Federal government was responsible for regulation, especially since States issued corporate charters. *Id.* at 764; *see also* Kennedy, *Federalism and the Force of History*, HOW FEDERAL IS THE CONSTITUTION 74, 75 (1983); and Lipton, *supra* note 43.

50. "Theodore Roosevelt well summed up this last quarter of the nineteenth century in

dered to enterprise association.

Since government was rejected by the nineteenth century paradigm, the emphasis was in turn placed on economy, altering the balance between naturally competing, but mutually dependent, elements. In essence, social values no longer provided a basic premise for either government or individual action, and economics became the end. Some commentators explain that economic liberty was confused with political liberty, as the good of the whole was subrogated to individual exploitation.[51] Since economic pursuits increased, and government intervention decreased, polity was simply overwhelmed. In sum, the laissez-faire mercantilism of the 1800's resulted in corporate dominance and trusts late in the century, which conceived the modern interventionist state born during the next century.[52]

E. *The Past Fifty Years—Excessive Government Intervention*

The growth of industry and at a time of very limited government involvement set the stage for a change to a new era of economics—and, a new paradigm. One commentator summarizes the historical events leading up to the polarization that occurred in the 1930's. He writes that:

> In the United States, the mercantilism of 1800 yielded to the laissez-faire of relatively small firms in the age of Jackson and Lincoln. This in turn was largely replaced by corporate concentration and trusts by the turn of the (19th) century, though the political gospel of laissez-faire continued to dominate both the Constitution, particularly as expounded by the Supreme Court, and the political process until the Great Depression and the advent of the New Deal . . . . Finally, with the arrival of the New Deal, the modern interventionists' state gradually came into full being, producing the political capitalism with which we are so familiar today.[53]

Government's role grew rapidly in three short decades and by

---

his *Autobiography*: 'A root of individualistic materialism, under which complete freedom for the individual . . . turned out in practice to mean perfect freedom for the strong to wrong the weak . . . . The power of the mighty industrial overlord . . . had increased with giant strides, while the methods of controlling them, . . . through the Government, remained archaic and therefore practically impotent.' " Morison, *supra* note 44, at 764.

51. Miller, *supra* note 16, at 162.

52. McDonald, *supra* note 29, at 76. Lipton calls this the second stage of corporatism. He writes that:

> [this development] spawned regulation designed to promote corporate responsibility to investors and to society at large. Congress passed the federal securities laws in order to promote corporate responsibility to owners of the corporation. Congress then extended corporate responsibility by addressing the needs of labor, consumers, and communities, through a variety of legislation.

Lipton, *supra* note 43, at 4-5.

53. McDonald, *supra* note 29, at 76.

the 1960's, Forrest McDonald explains that:

> [the federal government] launched a massive all-out effort to extend the American system of political economy far beyond the limits of what was possible. The fruits of these efforts, besides a general loss of faith in the system when the efforts failed, were a Supreme Court that legislates rather than adjudicates and a metastrasized federal bureaucracy. The Court, driven by a mindless compulsion to legislate equality, has changed not just the rules but the very object of [the] government [component of the socioeconomic formula], which was to provide as much individual liberty as is compatible with public safety. [Moreover], the bureaucracy, driven by a mindless compulsion to run everything, has changed not just the rules but the very objective of the econom[ic] [element of the formula], which was private pursuit of personal gain. Into the bargain it has all but abolished the idea that rewards should be commensurate with effort as measured by values set in marketplace. Government regulations are leading inexorably to zero economic growth (a goal that a number of bureaucratic agencies actively espouse).[54]

Now, special interest legislation replaces community consensus to fill the void left by the previous century's government inactvity.[55] But, "far from creating trust in government, the expansion of the concerns of government has bred distrust and resentment."[56] Liberty,

54. McDonald, *supra* note 29, at 73. Support for this sentiment abounds between the covers of many books. Perhaps the seminal work on the subject is R. WEAVER, IDEAS HAVE CONSEQUENCES (1948), which discusses America's impending dilemma. *See also* R. MCDONALD, THE PHAETON RIDE: THE RISE OF CRISIS OF AMERICAN SUCCESS (1974); W. SIMON, A TIME FOR TRUTH (1978); W. BUCKLEY, RIGHT REASON (1987); D. RAVEL, WHY DEMOCRACIES PERISH (1986), and the collected writings of Russell Kirk.

55. Democracy's original "revulsion against arbitrary government" has been lost in the cosmos. Sobran, *supra* note 15, at 30. Bruno Leoni explains that:

> [t]he new meaning of legislation corresponds not to a "common" will, that is, a will that may be presumed as existent in all citizens, but to the expression of the particular will of certain individuals and groups who were lucky enough to have a contingent majority of legislators on their side at a given moment . . . . Legislation has come to resemble more and more a sort of *Dicktat* that the winning majorities in the legislative assemblies impose upon the minorities, often with the result of overturning long-established individual expectations and creating completely unprecedented ones. Furthermore, legislation may have and actually has in many cases today a negative effect on the very efficiency of the rules and on the homogeneity of the feelings and convictions *already prevailing* in a given society. Instead of promoting stability, as a general law does, interest bound legislation undermines it.

Id.

56. Miller, *supra* note 16, at 163. One author notes that:

> Of course intrusiveness is in the eye of the beholder. One person's intrusiveness is another person's governmental vigilance on behalf of justice. But millions of Americans found intrusive and intolerable such government actions as forced busing to achieve racial balance, mandatory reverse discrimination (a.k.a. "affirmative action") including hiring and firing quotas that overrode seniority claims, the minute supervision of businesses by bureaucratic administrations of occupational safety and health regulations, the supplanting of community standards by national requirements regarding regulation of pornography, the over-

which is central to maintaining democracy and the republic, has been whittled away. The delicate balance between polity and economy has been put in further jeopardy.[57]

The rise of "inflated legislation" has distorted the public "understanding of the character of law."[58] Instead of being a mechanism by which to maintain and support the polity's goals as conceived by Madison, it is now used to provide both motive and values.[59]

"Ideally," Aristotle said, "there should be few laws seldom changed."[60] In the American Republic, commands[61] have supplanted communal laws;[62] and, well-intended regulations have been superseded by excessive regulation.[63] Civil association dominates enterprise association. Although this is not an absolute, even those "regulations (that) achieve legitimate goals" cause "inefficiencies, adding

---

> turning of fifty state judgments concerning the regulation of abortion, the banning of voluntary school prayer in public schools, the banning of even a minute of silence in public schools (lest a pupil lapse into an unconstitutional frame of mind), judicial fine-tuning of public displays of religious symbols, and on and on and on. No particular intrusion offended everyone, or even a majority. But the accumulation of aggrieved minorities produced a national mood.

G. WILL, *supra* note 31, at 85.

57. One critic explains that:

> Government regulation has profoundly affected the climate in which modern business must operate. Complex and sometimes contradictory regulation require large expenditures of time and money and make it increasingly difficult for business to act. The opportunity is ripe for business to take the initiative . . . and change many aspects of its relationship with government, but if it loses this opportunity there will be grave consequences for the future of private enterprise and our democratic society as a whole.

J. DIEBOLD, THE ROLE OF BUSINESS IN SOCIETY 57, 58 (1982)
hereinafter J. DIEBOLD].

58. Sobran, *supra* note 15, at 28.

59. *Id.* at 31.

60. *Id.* at 28. Sobran writes that:

> this is so for several reasons. One is that those laws are best that require least enforcement — laws that are rooted in the moral habits of the citizens, and enjoy the citizens' respect for their permanence. Another is that it is a general function of rules, tacit or explicit, to make social life predictable. If law is unpredictable, it loses its appropriate character. Moreover, positive law should have the quality of seeming to be discovered or elicited from tacit moral understanding commonly shared, rather than imposed by an effort of will. The very nature of civil equality makes it wrong for one part of the community use legislation as the instrument of its own special interests; to do that is to make the rest of the community to some degree subject to the arbitrary will of those who control the legislature — a circumstance the Framers of the Constitution were anxious to avoid, though the techniques of factional politics have outwitted their careful arrangements over the years.

Id.

61. "Commands are positive expressions of will. They leave no alternatives." *Id.* at 29.

62. "Laws are impersonal rules, general, disinterested, usually negative in form. They don't specify what substantive actions we are to perform, but merely attach 'adverbial conditions' to whatever courses of action we may happen to choose. Laws are 'observed,' commands are obeyed.' To live under the rule of law is to be a citizen, to live under commandment is to be subject." *Id.*

63. Hudgins, *supra* note 10, at 29.

needless cost to United States business."[64] And, from a purely economic vantage, the "state's substantive purpose" has stifled growth and opportunity, threatening the long-term economic health of the nation.[65]

Moreover, "the ability of United States industry to adjust to varying domestic and international patterns of demand, supply, and prices (in the twenty-first century) will depend on the flexibility of the United States economy. "Flexibility is served by reforming those government policies that distort the market and add needlessly to the cost of doing business, and discourage risk taking and innovation."[66]

---

64. For example, John Diebold writes that:

> It all started in 1887, when the U.S. Congress began to pass laws requiring federal government regulation of business. The state governments followed. As is always the case when governments get involved, the regulations and the agencies keep on growing. In the past decade, they have run rampant. During this decade, we have: (1) created one new major federal regulatory agency each year; (2) increased from seven percent to 30 percent the percentage of GNP represented by regulated industries; (3) increased the number of pages of new government regulations of business from 10,000 in 1970 to 70,000 in 1977; and (4) established 43 pages of regulations for even the "voluntary wages and price controls." The cost of this regulation ran at the rate of approximately $100 billion last year (1981).
>
> There has been a considerable loss of public confidence in all institutions. United States public confidence in business was down to 22 percent in 1978 from 55 percent in 1966. Confidence in big government has also dropped from 41 percent in 1966 to 14 percent in 1978.

J. DIEBOLD, *supra* note 57, at 60-1.

65. Hudgins, *supra* note 10, at 11. William A. Niskanen notes that:

> Federal spending data reflect a massive change in the federal role in the postwar period. From fiscal year 1947 through fiscal year 1976, total spending for national defense, international affairs, veterans, and interest increased at an annual rate of six percent. Total federal spending for all other functions increased at an annual rate of about 13 percent. Federal spending for the other functions increased from about 17 percent of total federal outlays to about 58 percent of the (1976) budget. Most of this current federal spending does not have an explicit constitutional basis in the enumerated powers. Moreover, this spending data does not reflect the large federal lending program or the addition of federal regulatory powers affecting product and occupational safety and uses of the environment.

Niskanen, *Public Policy and the Political Process*, GOVERNMENTAL CONTROLS AND THE FREE MARKET 78 (Pejovich, ed. 1976).

66. Hudgins, *supra* note 10, at 11. He argues that reform of government and trade regulation should, *inter alia*, include:

> 1. Tightening the Freedom of Information Act to ensure the confidentiality of U.S. Trade Secrets.
> 2. Setting reasonable standards and liability limits for product liability suits.
> 3. Streamlining the export licensing process.
> 4. Repealing the Foreign Corrupt Practices Act.
> 5. Removing all "voluntary" quota restrictions and dismantle all U.S. enforced cartels that restrict suppliers of goods and raw materials in the U.S.
> 6. Avoiding domestic content legislation.
> 7. Requiring the U.S. Trade Representative's office to issue annual reports on U.S. trade restrictions.
> 8. Beginning negotiations with the European Community for bilateral phasing out of agriculture subsidies.
> 9. Instructing U.S. representatives to international economic organizations to oppose policies to close foreign markets.
> 10. Creating free trade areas with countries that seek totally open markets.

In sum, here is what has resulted: government no longer establishes guidelines that state the parameters for the individual pursuit of liberty; the rule of law, which in theory should support and maintain the common enterprise, now sets motives and values; social values no longer provide the catalyst to economic enterprise and have been replaced by an economic orthodoxy; excessive regulation impedes the prosperity of commerce; and symmetry is not maintained by a government of purposeful laws. There is, however, a primer available under the tutelage of the international securities market.

III. Securities and Internationalization: Means to an End

The "internationalization of the securities market"[67] is a generic concept that describes two principal understandings: "It can mean the internationalization of the 'primary'[68] markets or it can mean the internationalization of 'secondary'[69] trading."[70] Multinational trad-

---

Id. at 13-15. (Additionally, this comprehensive study puts forth an eight plank competitiveness platform designed to promote economic growth. Each of the eight planks contributes to the primary goal of maintaining the advantages of the market system and eliminating counterproductive government practices. The above list is only a selection from those specific proposals for reform outlined by the eight planks.) *Id.*

67. One author describes what is meant by an international market. He explains that:

> [S]ecurities, both debt and equity, increasingly are being offered for sale on a multinational basis. In addition, they are being traded actively in more than one market throughout the world. Institutional investors, in particular, have become very interested in actively trading securities, both foreign and domestic, because they are looking for economic opportunities worldwide and they hope to reduce investment risk through worldwide strategies . . . . What, however, has caused the greatest interest in international trading has been the recent surge in equities . . . . Issuers, in particular, want to raise capital worldwide on an inexpensive, easy and quick basis . . . . Institutional investors, particularly in the United States, (pension funds)—have gotten into the foreign securities market with a vengeance . . . . One of the most important developments in bringing this about is simply the advances in technology. If one can readily access numerous liquid markets, and know immediately what is happening in other markets around the world, one has a significant trading advantage. If there is a buyer somewhere willing to buy, and a seller somewhere willing to sell at the same time of day, and technology provides the ability to reach that buyer and seller efficiently, it is a transaction that today can be made.

Ketels, *An Overview of International Trading*, 4 B.U. INT'L L.J. 11 (1986) [hereinafter Ketels].

68. The primary market is a closed transaction, where the initial offering is conducted by the offerer to investors. In essence, this transaction centers on the issuance of securities and is the principle means by which companies generate capital. Generally, an underwriter or an underwriting syndicate will purchase the entire package at a discount, and then attempt to resell the securities at face or better on the secondary market, discussed *infra*. These firms make their money on the difference in the spread between the discount and market price. In transnational offerings, the process is basically the same, subject to the varying specific rules that govern issuance on each foreign exchange.

69. The secondary market is where the underwriter sells securities on the open market. After his initial sale, the shares are traded back and forth between investors through brokers. In essence, this transaction only involves trading and not issuance. For example, this is the type of transaction that an individual utilizes to purchase shares on any American stock exchange. Internationally, it represents the listing of stock in more than one country.

70. Lorenz, *EEC Law and Other problems in Applying the SEC Proposal on Multinational Offerings to the U.K.*, 21 INT'L LAWYER 795 (1987) [hereinafter Lorenz].

ing of securities is a means by which institutional investors diversify their portfolios to spread their risk and capitalize on a foreign market.[71] The international securities market is, in essence, the eighteenth century model in microcosm. By its very nature, it encompasses the formula of democracy equals polity plus economy less restrictions, but in a financial sense. The only portion of the equation that changes is the substitution of "international market" for "democracy."[72] The competing interests are the same, only the objective has changed. In short, the example of multinational trading of securities provides is reminiscent of our national origins, of government cast on the anvil by expediency tempered by prescription and tradition. Before continuing further, it would be profitable to digress somewhat, and examine the continuing evolution of the international securities market more closely before moving the inquiry to the more lofty heights of a revived theorem of government.

A. *Advent of the Continuous Market*

The process of integrating the major capital markets of the world is moving securities trading toward an unified, continuous market. "The proliferation of modern information systems and other technological advances" has been the impetus behind the "growth of the international market."[73] This has resulted in "the ability to consummate transactions without coming under scrutiny of various regulatory authorities," which, in part, stimulates additional growth.[74] An ongoing financial revolution or liberalization policy has been occurring throughout the world.[75]

71. Merloe, *Internationalization of Securities Markets: A Critical Survey of U.S. and EEC Disclosure Requirements*, 8 J. BUS. & CAP. MKT. L. 249, 251 (1986) [hereinafter Merloe]. *See generally* Thomas, *The Internationalization of the Securities Markets: An Empirical Analysis*, 50 GEO. WASH. L. REV. 155 (1982).

72. The perils are virtually the same for either democracy or the international market. The formula's basic premise is not altered: only by balancing polity, economy and government will democracy flourish. The same reasoning is applicable to the international securities market. Without balancing the competing national interests to preserve the various international ones, the market will lose its liquidity, national factions will bred, which could bring about the destruction of the market, and, in all likelihood, it could collapse under its own weight. As the 18th century model is a formula for government that holds in abeyance those vexatious elements of society by balancing polity and economy with government restrictions, so too is the international securities market a mechanism by which to encompass the sometimes inimical financial pursuits and regulations of nations, which foster or inhibit multinational opportunities for generating wealth and capital. In theory, it is applying the microcosmic 18th century model on the macrocosmic scale of the international market.

73. Hasteline, *International Regulation of Securities Markets: Interaction Between U.S. and Foreign Laws*, 36 INT'L & COMP. L.Q. 307, 328 (1987) [hereinafter Hasteline].

74. *Id.*

75. The financial revolution occurred in the United States when the securities markets were deregulated. Similarly, the liberalization policy is still happening in Japan, as the exchange there opens its market to foreigners. Stock market reform in the shape of government revamping monetary policies, deregulation and modernization of capital markets is also occurring on many smaller exchanges. These include: the Paris Stock Exchange (the French Parlia-

1. Big Bang—U.K.—The United Kingdom was one of the first exchanges to alter its traditional customs of working within the financial services sector, and move into the international arena. In the 1970's, the British Parliament passed The Restrictive Trades Practices legislation, which was later extended to service industries by legislative order.[76] The law required the Director of the Office of Fair Trading (OFT) "to refer all registered agreements to the Restrictive Practices Court for a ruling on whether or not the restrictions in the agreement are against the public interest."[77] Initially, the London Stock Exchange asked for an exemption; however, it later acquiesced to a "series of changes in its rules."[78] Thus, with some prompting from the government, the impetus for change was the first step toward participation in the international market.

The London Stock Exchange's entry into the international arena was also, in part, initiated to gain a greater share of the world market.[79] Otherwise, as one proponent noted, "we would have lost our business to Tokyo or New York."[80] In short, London serves as the middle link between East and West to facilitate twenty-four hour trading.

2. Twenty-four Hour Trading—Globalization of Trading.—Twenty-four hour trading is the means by which globalization of financial markets is establishing, in effect, a unitary world exchange. Japan, fourteen hours ahead of New York, opens the day's trading based on New York's closing prices until London awakens to begin buying and selling based on the Japanese transactions. The Japanese exchange has opened trading nine hours earlier, and in advance of New York trading, which opens five hours later, to finish

ment approved a basic structural reform law on December 20, 1987, which went into effect January 22, 1988); the Netherlands' four exchanges (the Dutch Government has submitted the Supervision of Securities Traffic Bill to its Parliament to balance statutory regulation and self regulation); the Danish Stock Exchange (the Reform Act was termed the "Little Big Bang); and in Belgium, Finland, Luxemburg, Norway, Sweden, Switzerland and Pacific Basin.

76. Edmonds, *Research Note: No. 304—"The Big Bang*, House of Commons Library Research Div., at 1, (Oct. 10, 1986) [hereinafter Edmonds].

77. *Id.*

78. *Id.* at 4. These changes included, ending minimum commission fees, admitting laymember to the exchange, organizing a new appeal body, changing membership on the existing appeals committee, and, most notably, eliminating "single capacity—the separation of the functions of stockbrokers and jobbers." *Id.*

79. Edmonds, *Research Note: No. 384—Financial Life After Big Bang*, House of Commons Library Research Div., at 17, (Jan. 21, 1988).

80. *Id.* These changes facilitated increased competition, elimination of fixed commissions, and London's continued presence in the world market for securities and finance. *Id.* at 1. If these changes had not been implemented, London would have continued to decline, as its market capital resources were rapidly becoming insufficient to meet the growing world demands and changing circumstances. *Id.* at 9. Interestingly, if the United States does not revise the Glass-Steagall Act to allow commercial banks to actively participate in the financial markets, the London Exchange hopes to capture the business, as United States banks go abroad to foreign markets through their (foreign) subsidiaries. *Id.*

one and one-half days' worth of transactions within a twenty-four hour period.[81] Each exchange is dependent on the one opening before it to establish the day's initial bid price for equities.[82]

Another aspect of twenty-four hour trading is clearance. The Options Clearing Corporation (OCC) filed a proposed rule change with the SEC to authorize the creation and development of an International Clearing System (ICS), which is "designed to accommodate trading of OCC-cleared products worldwide on a twenty-four hour basis."[83] The OCC's proposal states that:

> [T]he increasing internationalization of securities markets has caused extended trading hours due to:
>
> (1) The trading of the same securities in two or more markets located in different time zones, and
>
> (2) extended trading hours in domestic markets that are intended to coincide with business hours in foreign markets.
>
> OCC believes that eventually some OCC-cleared products will be traded somewhere in the world 24 hours a day. To accommodate those expected trading hours, OCC has designed ICS, a new clearing system for a trading day that begins at about 7:00 pm Eastern Time, and which would continue until as late as 4:00 pm on the following business day.[84]

Finally, the NASDAQ is marketing a "unified trade quotation system"[85] to provide a constant international link.[86]

---

81. Leibler, *A Bigger Slice From the Big Apple*, 1 GLOBAL INVEST. MGMT. 178 (Summer 1988).

82. One investment house is already capitalizing on the information gleaned from trading in earlier foreign sessions before the opening bell of the N.Y.S.E. The company's trading book is sent to Tokyo to record the day's trading trends and movements, is shipped to the London office where more information is added, and finally to New York. There is a "detailed color (background) of what has taken place in the Tokyo and London market." Hunter, *The Status and Evolution of Twenty-Four Hour Trading: A Traders Views of International Transactions, Clearance, and Settlement*, 4 B.U. INT'L L.J. 15, 17 (1986) [hereinafter Hunter].

Other banks and brokerage houses use satellite and landline technology to transmit information around the world. Although beyond the scope of this inquiry, some of the global communication technology currently available includes: BBN Communications' pack switching networks (an internal computer link-up), Reuters' Integrated Data Network (IDN) (a storage, incoming and outgoing world quotation database), touch-screens, on screen dealing via Reuters' Instinet Service, and Cruising Network (an automated trading system that adjusts a portfolio via matching buy/sell orders by executing and clearing transactions at day's closing price). These new developments are rapidly creating a direct global electronic exchange. Jones, *Passing the Book Around the World*, 1 GLOBAL INVEST. MGMT. 287-92 (Summer 1988).

83. Sec. Exch. Act Rel. No. 34-24891 (Sept. 9, 1987) [hereinafter S.E.A.R. 34-24891].

84. *Id.*

85. Hunter, *supra* note 82, at 23. One exchange principal notes that:

> The NASDAQ market is also a major force in the continuing development of the 24-hour global equity market. Its automated system links dealers over large distances through their computer screens and represents a modern alternative to the centralized floors of the established stock exchanges. The decentralized NASDAQ structure of multiple dealers, or market makers, in equities is

3. *Pilot Programs.*—Different programs throughout the world have been implemented to foster, at first, bilateral coordination of markets to prevent price and rule disparities. Harmonizing world exchanges encourages market liquidity and attempts to reconcile divergent national regulatory schemes and surveillance practices, allowing free market forces to operate unimpaired. Over a period of two years, the National Association of Securities Dealers, Inc. (NASD) has filed with the Securities and Exchange Commission (SEC) several proposed rules changes to allow the development of pilot[87] programs that first opened up international markets, and second, maintained a degree of transnational central control and oversight by the SEC.

a. *International Stock Exchange.*—The first step toward coordinating foreign markets with the United States exchanges was outlined in a proposed rule change by the NASD to the SEC. Under the NASD proposal, they requested the implementation of a Pilot Program that allowed an interchange of information about selected international securities to occur between the NASD and the International Stock Exchange located in London.[88] This "encourages broader participation by international dealers, enhances opportunities for directing orders to the market offering the best prices, improves liquidity in the markets for eligible securities, and promotes complimentary enhancements to international clearance and settlement processes."[89] In short, NASD acts as a vendor of information collected outside the traditional marketplace, and then disseminates it to a myriad of interested recipients.[90]

> seen by many as creating a market mechanism with more competition, greater capital support, higher liquidity, and superior sponsorship of stocks, compared to the traditional, single-specialist system of the exchanges. When the international stock-exchange in London restructured itself during Big Bang of 1986, it did so along NASDAQ lines, with an automated system known as SEAQ (Stock Exchange Automated Quotations) and competing dealers. Likewise, Singapore has created the SESDAQ (Stock Exchange of Singapore Dealing and Automated Quotations) system and also operates with multiple market makers.

Hardiman, *The International NASDAQ Market*, 1 GLOBAL INVEST. MGMT. 171 (Summer 1988).

86. *Wall Street Goes Global*, U.S. NEW & W. REP. Mar. 24, 1986, at 57.

87. *See infra* notes 88-91 and accompanying text.

88. Sec. Exch. Act Rel. No. 34-24364 (April 17, 1987).

89. *Id.*

90. The information is distributed free to NASDAQ market makers and Exchange dealers who trade the quoted securities. Others pay a subscription fee to the NASD's National Quotation Data Service (NQDS) or the Exchange's CRS Data Services. The information displayed has to be "of sufficient value and integrity to warrant processing by the marketplace for dissemination to the world through a diverse network of information procedures." This will make the marketplace more efficient and economical by "linking two world marketplaces through the application of technology. The linkage constitutes an important step toward the establishment of regulatory programs of mutual benefit, the expansion of trading opportunities both here and abroad, the provision of more efficient markets and economic incentives to direct order (systems) in linked securities to the best available market." *Id.*

The objective of the International Stock Exchange Pilot Program includes:

> [T]wo-way dissemination of last sale reports in selected securities; linkage of the respective small order processing systems; development of a composite display of market makers' quotes from both market centers; and development of an automated confirmation procedure that will yield locked-in trades to facilitate clearance and settlement.[91]

In essence, the Program links both domestic and foreign securities exchanges via transatlantic communication networks, enabling analysts on both sides of the ocean to examine international trading trends and opportunities.[92] The NASD has applied for and received approval of another pilot program to link Far-East markets.

b. *Singapore.*—On October 7, 1987, a second Pilot Program was proposed by the NASD with the SEC to authorize the implementation of a system that links New York with the Stock Exchange of Singapore (SES).[93] This Pilot Program was scheduled to be fully operational by December 1, 1987 for a two-year trial term.[94] Due to a thirteen hour time difference, "the end-of-day information to be exchanged under the Pilot Program will mainly assist in establishing opening prices the following day."[95]

The first phase of the Program is limited to the "collection and dissemination of final trading information on thirty-five NASDAQ stocks[96] after the close of trading in each market"—SES and NASDAQ.[97] The program is designed to create a new foreign equities market modeled after the NASDAQ system.[98] In turn, this will facilitate the development of a Singapore dealer market in the thirty-five listed securities "while the NASDAQ market is closed."[99] "Hence, the Pilot linkage consists of two daily transmissions of static information, one by each market, after the close of the respective

---

91. *Id.*

92. Sec. Exch. Act Rel. No. 34-24544 (June 7, 1987). This Pilot Program has been the subject of many SEC Releases. *See* SR-NASD-86-4; SR-NASD-86-26, SR-NASD-86-35, SR-NASD-87-15, SR-NASD-87-20, and SR-NASD-87-24.

93. Sec. Exch. Act Rel. No. 34-25065 (Oct. 28, 1987).

94. *Id.*

95. *Id.*

96. The information to be interchanged is limited to the thirty-five NASDAQ stocks selected to participate in the Pilot. This trading news includes:

1. the closing quote of each market makers;
2. the closing inside market;
3. the last reported sale (for NASDAQ/NMS issues); and
4. cumulative volume for that day.

Id.

97. *Id.*

98. *Id.*

99. *Id.*

SES and NASDAQ markets in the subject securities."[100]

The objective of the Program is to "significantly improve the competitive dynamics of the international markets for these securities" by linking the New York and Singapore Exchanges.[101] Moreover, both markets have agreed to coordinate regulatory activities and interchange information related to such practices.[102] Using this Program to establish opening share prices provides for a coordinated, more stable world market. This constitutes an early attempt at an international regulatory scheme.

B. Regulation

The manner by which the financial markets are organized to allow the free flow of capital on an international scale also needs to be addressed. The process is complex, and problems abound when one nation attempts to regulate outside its own borders. Although there are many equivalent practices between nations, there are as many differences.[103] This new trend toward internationalization demands that regulators be extremely reflective of international needs and trends, and lines of demarcation clearly set forth.

1. SEC.—Regulation in the United States is founded on a strong central regulatory body: the Securities and Exchange Commission (SEC).[104] The Commission attempts to balance the need to expand the international role of investment in and investment by the American financial community with Congress' desire for complete disclosure.[105] There has been a plethora of SEC letters and releases,[106] concerning different methods by which to achieve a balance between requiring full disclosure without unnecessarily burdening

---

100. *Id.*

101. *Id.*

102. *Id.*

103. Merloe, *supra* note 71, at 265-67.

104. Hasteline, *supra* note 73, at 307. For a thorough examination of United States securities laws and regulations, *see* H. BLOOMENTHAL, *supra* note 1.

105. Hasteline, *supra* note 73, at 307. (This article discusses "some of the ramifications of participation in international securities transactions, giving particular emphasis to the view of United States courts in this respect.") *Id.*

106. SEC Release No. 33-6568 proposes uniform requirements that, in turn, facilitate multinational securities offerings. For a discussion of its faults and merits *see* Lorenz, *supra* note 70, at 795-808. Other SEC releases and letters that have also considered this issue include: Sec. Exch. Act Rel. No. 34-25322 (Feb. 5, 1988); Sec. Exch. Act Rel. No. 33-6754 (Feb. 7, 1988); Sec. Exch. Act Rel. No. 25065 (Oct. 28, 1987); Sec. Exch. Act Rel. No. IC-16049 (Oct. 14, 1987); Sec. Exch. Act Rel. No. 34024979 (Oct. 2, 1987); Sec. Exch. Act Rel. No. 34-24891 (Sept. 9, 1987); Sec. Exch. Act Rel. No. 34-24862 (Aug. 28, 1987); Sec. Exch. Act Rel. No. 34-24891 (Aug. 21, 1987); Sec. Exch. Act Rel. No. 34-24832 (Aug. 21, 1987); Sec. Exch. Act Rel. No. 34-24544 (Je. 3, 1987); Sec. Exch. Act Rel. No. 34-24475 (May 19, 1987); Sec. Exch. Act Rel. No. 34-24364 (Apr. 17, 1978); Sec. Exch. Act Rel. No. 34-24292 (Apr. 2, 1987); Sec. Exch. Act Rel. No. 33-6690 (Feb. 13, 1987); Sec. Exch. Act Rel. No. 34-23952 (Jan. 5, 1987); and assorted SEC letters filed during 1988 and 1989.

foreign issuers with requirements that necessitate unfamiliar practices.[107] To complicate matters, the "various domestic markets of the world are at extremely divergent stages of development,"[108] and there is a need to reconcile the fundamentally incompatible parts.[109]

Regulating foreign access and protecting American investors, however, is only one piece of the puzzle. The capital markets themselves are also "shaped by sometimes strikingly different needs, interests, traditions and institutions."[110] Generally, regulatory and capital market problems can be broken down into four categories: (1) execution,[111] (2) clearance and settlement,[112] (3) manipulation,[113] and (4) insiders.[114] To mitigate some of these problems, one commentator argues that there should be an "expansion of the national regulatory system to transnational transactions," broader "international cooperation" between States,[115] "and where international co-

---

107. Sec. Exch. Act Rel. No. 33-6779 is the first attempt by the commission to propose a rule reconciling the 1933 Act's registration requirements and international transactions in nearly 25 years. 20 SRLR 912 (Je. 17, 1988). The proposed rule states that:

> [t]he regulation would provide generally that any offer or sale that occurs within the United States is subject to Section 5 of the Securities Act and any offer or sale that occurs outside the United States is not subject to Section 5. The Regulation would set forth facts considered important in determining whether an offer or sale occurs outside the United States. Additionally, the Regulation would provide "safe harbors" for specified transactions. Offers and sales meeting all of the conditions of the applicable safe harbors would be deemed to be outside the United States and, therefore, not subject to Section 5. The Regulation, as proposed, would not be available with respect to offers and sales of securities issued by investment companies required to register under the Investment Company Act of 1940.

17 CFR § 230, 20 SRLR § 952 (1988).

108. Hasteline, *supra* note 73, at 309.

109. *Id.*

110. Kubler, *Regulatory Problems In Internationalizing Trade Markets*, 4 B.U. INT'L L.J. 107 (1987) [hereinafter Kubler]. For an interesting analysis of the similarities and differences between the United States and the United Kingdom disclosure requirements and the present status of foreign issuers in the United States, and the feasibility of transatlantic multinational offerings, *see* Lorenz, *supra* note 70, at 796, and Merloe, *supra* note 71, at 249.

111. This problem centers on the different systems relaying information about current prices and execution of orders. Kubler, *supra* note 110, at 111.

112. In this instance, the focus is on the lapse of time that naturally occurs between buy and sell transmissions between countries and the resulting obligations incurred by participants to each contract. *Id.*

113. Regulation in this area attempts to extend rule 10b-6 to foreign transactions that are used to manipulate domestic prices. *Id.* at 112. For instance, an investor may use a technique that the SEC deems illegal, but a foreign exchange does not, in order to manipulate the market and drive up the price of a stock on the American market. By using legal manipulative practices in London, an investor may drive up the value of stock A. When New York opens, market makers will only see that stock A has been active and moved higher in London trading, thus the specialist opens trading on stock A at a higher price as the foreign investor sells off holdings. The manipulation is difficult to discover when it occurs overseas. Yet, it still affects the United States market, giving international players something of an unfair advantage over less sophisticated investors.

114. An "effective mechanism of enforcement needs to be used to prevent the circumstance of national rules against insider trading through the use of foreign financial institutions or trading on extraterritorial securities markets." *Id.*

115. The SEC submitted to Congress the "International Securities Enforcement Act of 1988" (S 2544 & HR 4945) to expand their enforcement authority when asked to participate

operation is troublesome," an increase in laws and regulations.[116]

Much has been written in this area discussing the intricacies of international regulation by a domestic agency.[117] In 1985, the SEC proposed three different concept releases: (1) a general appraisal,[118] (2) waiver by conduct,[119] and (3) a comment prospectus.[120] To date, none of these proposals have been implemented.

2. *World (foreign).*—The regulation of securities worldwide presents a challenge.[121] Yet, regulators can profit from their collective experience in regulating their own domestic markets.[122] As the international market moves closer to a unified exchange, national legislation will be superseded by an international regulatory scheme. Otherwise, the multiplicity of domestic rules will impede an efficient market. Thus, world securities regulation will primarily focus on the following areas: "(1) the distribution of securities, (2) listing and reporting requirements, (3) takeovers and acquisitions, (4) proxy regulation, (5) insider trading, and (6) regulation of securities professionals."[123]

The objective of an international scheme is to foster the "cen-

---

in an investigation conducted by a foreign country. Previously, the Commission was limited both in its scope and to only possible violations of United States law. The proposal "would provide the SEC with the authority, at its discretion, to conduct investigations it deems necessary to collect information and evidence for a foreign authority that has asked for help." 20 SRLR 667-8 (May 6, 1988). This legislation came as a response to an agreement with Canadian Securities officials in January 1988. *Id.* Subsequently, Brazil signed a similar memorandum. 20 SRLR 1059 (July 8, 1988).

116. Kubler, *supra* note 110, at 112. On another front, the U.S. Commodity Futures and Trading Commission (CFTC) and Britain's Securities and Investment Board (SIB) have agreed to closer border cooperation. The CFTC will now police a great deal of London's securities business. In fact, the American National Future Association will supersede the SIB and unprecedentedly be given jurisdiction over disputes between British firms and American clients. The Economist, *Overbearing and Overthere* (Mar. 18, 1989) at 88.

117. *See* Kubler, *supra* note 110.

118. Sec. Exch. Act Rel. No. 21-958 [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) 83,759 (April 18, 1985), which questions the internationalization of securities markets.

119. Kubler, *supra* note 110, at 113. "It is deemed that one who trades in the United States has submitted himself to be bound by United States laws, including discovery." *Id.*

120. Sec. Exch. Act Rel. No. 33-6568, 50 Fed. Reg. 9281 (1985).

121. A comparison, however, of the various regulatory approaches is beyond the scope of this writing. *But see* Kubler, *supra* note 110.

122. H. BLOOMENTHAL, *supra* note 1, at 1-61. The SEC issued a policy statement calling for multinational agreements in order to achieve a world market system. It stated that:

> [A]n effective (world) market system should include the following: (1) efficient structures for price, quotation, and volume information, order routing, order execution, clearance, settlement, and payment, as well as strong capital adequacy standards; (2) sound disclosure systems, including accounting, auditing, and auditing independence standards, as well as registration, prospectus, and listing standards; and (3) fair and honest markets.

20 SRLR 1753 (Nov. 18, 1988).

123. H. BLOOMENTHAL, *supra* note 1, at 1-64. This list, however, is not inclusive, and there are other less prominent subjects worthy of attention and scrutiny. For example, the International Organization of Securities Commissions (IOSCO) developed "a detailed inventory of technical and regulatory problems related to multinational offerings." 20 SRLR 1066 (July 8, 1988).

tralization or integration of the world's markets."[124] This will facilitate the "efficient allocation of capital and (promote) economic progress throughout the world."[125] One commentator argues that this can occur by the international adoption of "uniform minimum standards" (UMS).[126] This would include uniform disclosure requirements and international accounting standards, and the organization of an international regulatory body.[127] Harold Bloomenthal writes that:

> [T]he protection of investors in foreign securities will ultimately depend upon the existence of a network of strong regulatory bodies capable of administering and enforcing local securities laws. Necessarily joined with effective and harmonious local regulation must be agreements for reciprocal regulatory and enforcement activities among participating countries.[128]

The financial markets have had the opportunity to grow freely without being plagued by overinclusive regulations. Symmetry has been maintained by both the SEC and world exchanges themselves without stifling economic growth and expansion. When the advancement impinges on the good of the whole, purposeful constraints should be, and are being, erected to check exploitation: in effect, the Hamiltonian theorem.

IV. Reclaiming a Patrimony: An Eighteenth Century Solution to a Twenty-first Century Dilemma

At its inception, the Hamiltonian paradigm was in part shaped by the dialogue that occurred between the Federalist and the Anti-Federalist.[129] The political and economic life of the community was

---

124. H. BLOOMENTHAL, *supra* note 1, at 2-50.

125. *Id.*

126. *Id.* at 2-48.

127. *Id.* at 2-49. Former SEC Chairman David Ruder argued in a lecture September 26, 1988, that securities regulators worldwide needed "to develop a coherent and coordinated approach to market regulation." 20 SRLR 1480 (Sept. 30, 1988). He cited three principle issues: (1) "the need for efficient and compatible automated national and international clearance and settlement systems in the international marketplace;" (2) "the importance of coordinated accounting procedures" and (3) a territorial approach regarding "the application of United States registration requirements to overseas offerings." *Id.* at 1480-81.

128. H. BLOOMENTHAL, *supra* note 1, at 2-50. For an interesting discussion of the "fragile nature of international securities regulation," *see Id.* at 1-147-1-155.

129. One author explains that:

> The Anti-Federalist dissented from the view that popular government or republicanism was possible in a vast extent of territory and under an energetic central government. The main reason for this belief, taken from Montesquieu, was that republicanism was possible only with public-spirited or virtuous citizens. Republican citizens had to be imbued with the "love of the laws of the country;" they had to exhibit "a constant preference of public to private interest." Only an alert, public-spirited citizenry, they believed, would give that amount of attention to public affairs that self-government or republicanism truly required."

debated publicly, and in turn, established an important foundation by which the polity addressed and assessed issues.[130] In the colloquy about competing paradigms, the excesses of the nineteenth[131] and twentieth[132] centuries present an interesting contrast to the Hamiltonian formula[133] and, in essence, are "Anti-Federalists" to the eighteenth century paradigm.

Restated, the Hamiltonian formula is expressed as: democracy equals polity plus economy less restrictions. As commercial expansion occurs, political stability is enhanced and factions quieted, and as political stability develops, economic expansion is fostered. The balance of the equation hinges on the degree to which government interferes via regulation. Learning from hindsight, the nineteenth and Twentieth centuries placed tremendous emphasis on either economy or government restrictions to achieve balance. In each century, one element of the equation dominated all others. In both periods, community consensus did not serve as a guide to pursue economic activities.[134] Thus, it is evident that democracy is served best when the elements have equal weight and influence.

Application of the eighteenth century formula is evidenced in the international securities market. In the United States, government regulation occurs as a reaction to exchange practices rather than as a preordained agenda set out by the "Fourth Branch" of government.[135] It is difficult to issue commands, disguised as laws, to achieve a grandiose "state substantive purpose" in the international financial sector. By definition, the nature of the equities market is such that it is difficult to formulate rules in anticipation of some type

---

Roots of Public Philosophy, *supra* note 25, at 23.

130. *Id.* at 74.

131. In this instance, the excess was not one of limitation but abstention; in essence, nonintervention despite the need to maintain symmetry. *See supra* notes 40-51 and accompanying text.

132. The excesses of the 20th century were the result of the federal government's "massive all out effort to extend the American system of political economy far beyond the limits of what was possible." Miller, *supra* note 16, at 76. *See supra* notes 54-67 and accompanying text.

133. *See supra* notes 29-41 and accompanying text.

134. Although beyond the scope of this inquiry, it would be interesting to examine whether the Hamiltonian revival has been extended to the socioeconomic dilemma that the nation has been facing since the 1930's. Simply, whether social values have again become the catalyst behind economic activity. Whether the question "Is it capitalistic?" has been replaced by the question "Does it work?" and support the values and goals of the polity? *See* Zoll, *supra* note 13, at 7.

135. One author notes that:

> There is nothing inherently wrong with ameliorative action from government. However, the instinct of modern government, and especially of liberal administrations, is to protect all client groups from all discomforts of change. Modern governments often are reactionary. They react against change. And they are schizophrenic reactionaries: They divide their energies between fostering economic dynanism and resisting the logic of dynanism.

G. WILL, *supra* note 31, at 167.

of undesirable practice; regulation occurs slowly, and generally after a substantial period of comment by the financial community. New financial products, including the technology used to implement, and methods by which to market them, on-going changes occurring at international exchanges—both as to regulation and organization, and the ease by which to move instantaneously an incredible percentage of total United States GNP around the world from financial market to financial market all inhibits anticipatory regulation. Invariably, the SEC is forced to wait and see what the rocket-scientists will develop next. The approach is bottom up rather than top down. This encourages both risk taking and imagination by financial experts.

The rapid growth and development of the international equities market, and the inherent problem of regulation across national boundaries has prevented overregulation. Further, regulators recognize that overrestriction of the international market will only drive business into the hands of foreign competition;[136] thus, change and restraint are approached with caution. The trend is "both philosophically and politically toward deregulation of markets."[137] This "permits free market forces to determine the way,"[138] but still allows room for purposeful government intervention to check exploitative practices.

The ability to generate capital in foreign markets, and the increased participation by foreign investors in American exchanges has expanded commerce. This development will be further facilitated by government that encourages a progressive economy. Conversely, it will be eroded if unpurposeful intervention is allowed to inhibit expansion and distort community-understood strictures. The goal, as always, is symmetry, balancing free market principles and the "mindless compulsion to legislate" to achieve a progressive economy that cultivates both liberty and democracy. In effect, the SEC delineates the parameters of civil association that allows enterprise association, in this case the financial community, to pursue its objectives. The rule of law remains fairly constant and predictable.[139]

---

136. This was the main impetus behind London's Big Bang. Otherwise, customers would turn to another exchange that could accommodate their financial needs.

137. Debs, *The Development of International Equities Markets*, 4 B.U. INT'L L.J. 5, 7 (1986). "This trend is visible in the United States [and the] United Kingdom, [and] for different reasons in Japan. The object is to remove restraints on competition, and philosophically this applies to foreign competition as well as domestic so that market forces will work." *Id.* at 7.

138. *Id.* at 5.

139. Although the echoes to bring program traders before the kind for execution in October, 1987, (and, again in October 1989) encouraged a knee jerk reaction that argued for a multitude of reforms, changes have only been slight. The result has mostly been limited to "headline grabbing" public hearings by members of Congress, and pounds of bureaucratic studies, and those proposals that were implemented have, for the most part, not adversely effected the free market system.

At present, American participation in the international securities market is growing rapidly due to the balanced eighteenth century approach taken by the SEC.[140] Participants want to promote internationalization and are reluctant to throw up any but the most necessary barriers in order to maintain full disclosure. Thus, whether noticed or not, the international securities market utilizes the Hamiltonian paradigm.

The financial revival bankrupts the theory that America is destined to fall headlong toward a "relative decline."[141] Indeed, it serves as a successful reminder of how commercial expansion can further economic growth when supported by unintrusive government.[142] Broader application of the formula to industry can achieve the same result.[143] The excessive regulation of the bureaucracy must be throttled in order to encourage industrial growth. In turn, this will enable the United States to once again step forward as a primary economic leader of the world in the twenty-first century.

V. Conclusion

The international market has reclaimed a patrimony, and applied an eighteenth century solution to a twenty-first century quan-

---

140. This is not to say, however, that this has been a deliberate approach by the SEC or securities market to build an international market by balancing government and economy. Indeed, it has been as much a part of business convention as a little bit of luck. Interestingly, one commentator notes that:

> The health and vigor of a nation's securities markets have long been considered reliable indicators of that nation's economic strength. The principal reason is that securities markets function as a primary means for private entrepreneurs to acquire the long-term risk capital used in development of new and better products, improved services, and advanced technology — all of which is essential to economic growth and stability.

H. BLOOMENTHAL, *supra* note 1, at 2-4-2-5. Moreover, the international market has increased the opportunities available to obtain various types of financing, as capital is no longer limited to select people or certain amounts. For the consumer, many financial service companies now offer investment products that speculate in and attempt to capitalize on foreign markets.

141. This thesis is unconvincingly presented in P. KENNEDY, THE RISE AND FALL OF THE GREAT POWERS; ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000 (1988).

142. William Schneider writes that:

> The role of government is the eternal issue in American politics. An economically activist federal government is one that manages, guides, and regulates the economy. Is that liberal or conservative? In the nineteenth century, when government was regarded as bastion of privilege, the out-groups of society favored a laissez-faire state. Jacksonion Democrats . . . opposed many forms of government economic intervention, such as a national bank, incorporated through legislative charter, and even government-sponsored internal improvements. The Federalists, and the Radical Republicans were more comfortable with statism and government intervention (for instance, Henry Clay's "American System"), which they defended in the name of nationalism.

G. WILL, *supra* note 31, at 169, (*quoting* Schneider, *The New Shape of American Politics*, THE ATLANTIC MONTHLY, Jan. 1987, at 50.).

143. "Americans [are] trying to define the appropriate government response to the fact that freedom and capitalism involve choices and casualties." G. WILL, *supra* note 31, at 169. Moreover, this entails an assessment of "the communities obligations to its members who are hurt by capitalism's dynanism." *Id.*

dary. The expansion of commerce results in political stability, and a secure polity encourages increased commercial development, thus reducing the natural propensity of government founded on democratic principles from suffering a violent death. A reclamation by American industry and government is the beginning of a pivotal transition period for the United States, and will bolster the nation as it enters the twenty-first century.